COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1923 **Cir. Ct. No. 02CV000088**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JEFFREY LOY, PAM JOHNSON LOY AND MICHAEL LOY,

PLAINTIFFS-APPELLANTS,

V.

DODGEVILLE SCHOOL DISTRICT, DAVID J. WESTOFF, SUPERINTENDENT, JEFF ATHEY, PRINCIPAL, AND TYM ALLISON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Iowa County: GEORGE S. CURRY, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 VERGERONT, J. In this action, Jeffrey Loy and his parents[1] allege that Tym Allison, Jeffrey's teacher at Dodgeville High School, committed battery against Jeffrey and was negligent when Allison removed Jeffrey from the classroom. The Loys appeal the summary judgment granted in favor of Allison on these two claims and in favor of him and the other defendants on related claims. The dispositive issues are whether there is a genuine issue of material fact on the battery claim and whether the defendants are entitled to immunity under WIS. STAT. § 893.80(4)[2] on the negligence claims. We conclude there are no genuine issues of material fact on the battery claim and that Allison is entitled to judgment as a matter of law dismissing this claim. We also conclude that all defendants are entitled to immunity under § 893.80(4) on the negligence claims. We therefore affirm.

BACKGROUND

¶2 The incident giving rise to the complaint occurred in November 2001 when Jeffrey Loy was a junior at Dodgeville High School. Jeffrey had previously been diagnosed with mild autism. As a result of the autism, Jeffrey had difficulty concentrating and became easily frustrated. ***Id.*** at 8. He had an Individualized Education Plan (IEP) that instructed teachers to send him to Mr. Carpenter's room when he became anxious and frustrated.

[1] Jeffrey's parents are Pam Loy and Michael Loy. Their claim for a loss of consortium does not require a separate analysis and therefore we do not refer to it in this opinion.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 At the time of the incident, Jeffrey was in Allison's English class. While Jeffrey was working with other students on a group project, a disagreement arose between him and the other students in his group. Jeffrey began to cry and went to sit at a table near the door of the classroom. The extent to which Jeffrey's conduct disrupted the class is in dispute. However, there is no dispute that Allison approached Jeffrey and said either two or three times Jeffrey needed to leave the room, that Jeffrey refused to do so, and that Allison then physically removed Jeffrey from the room. Later in this opinion we will discuss in greater detail the evidence showing the manner in which this occurred. For now it suffices to state there is no dispute that Allison used his hands and his body to move Jeffrey out the door and into the hall, and that Jeffrey's body—his right backside—came into contact with the wall and heater on the far side of the hall. At his deposition Jeffrey testified that "probably within a week or so my back felt really stiff."

¶4 The Loys sought an injunction under WIS. STAT. § 813.125 to prevent any further contact between Jeffrey and Allison. The circuit court denied the request for a restraining order, finding that Allison's actions toward Jeffrey were not designed to harass or intimidate Jeffrey, as is required by WIS. STAT. § 947.013(1m), which is incorporated by reference in § 813.125(5)(a)3.[3]

[3] WISCONSIN STAT. § 947.013(1m) provides:

> **(1m)** Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:
>
> (a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.
>
> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

¶5 The Loys then filed this action, alleging battery and negligence against Allison; negligent supervision and other negligence claims against the Dodgeville School District, the Superintendent of the District and the Principal of Dodgeville High School; and interference with contract and violation of the Americans with Disabilities Act (ADA) against all defendants.

¶6 The defendants moved for summary judgment. They contended that, based on the undisputed facts, Allison's conduct was lawful under WIS. STAT. § 118.31, which prohibits corporal punishment with certain exceptions. Thus, they asserted, they had a defense to all the claims against them. In the alternative, they contended that all the negligence claims were barred by immunity under WIS. STAT. § 893.80(4), there was no evidence of negligent supervision, or of a contract between Jeffrey and the District; and Jeffrey had not exhausted his administrative remedies with respect to either the interference with contract claim or the ADA claim.[4]

¶7 The Loys opposed summary judgment on the ground that there were disputed issues of fact precluding summary judgment on all claims, on the defense under WIS. STAT. § 118.31, and on the immunity defense. However, they conceded they had not filed administrative complaints regarding the IEP or the ADA claim.

[4] The defendants also contended that, because of the injunction hearing, issue preclusion applied to entirely preclude this litigation. The circuit court agreed with Jeffrey that it was fundamentally unfair to apply issue preclusion. Although the defendants argue issue preclusion as an alternative basis for affirming on appeal, we do not discuss issue preclusion because we affirm on other grounds.

¶8 The circuit court decided the defendants were entitled to summary judgment on all claims. The court concluded that, viewing the evidence in the light most favorable to Jeffrey, Allison's intent was to maintain order in the classroom and he used "minor" and "reasonable" physical contact for that purpose as allowed by WIS. STAT. § 118.31(3)(h). In this analysis, the court relied on Jeffrey's deposition testimony describing what happened: that he got mad at his group, "raised his voice," was crying, refused to leave when asked, resisted when Allison put his hand on his shoulder, and then was pushed out the door by Allison. The court observed that there was nothing in Jeffrey's testimony that suggests that Allison slammed him or shoved him into the wall in the hall, or that going against the wall caused Jeffrey pain at that time. As for Jeffrey's testimony that his back was stiff sometime within a week, the court noted that there was no medical evidence, and the connection between the stiff back and the incident was speculative. In the court's view, its resolution under § 118.31(3)(h) disposed of all "derivative claims." The court granted summary judgment on the remaining claims because there was no evidence of a contract, no evidence showing a connection between this incident and other incidents that would make the District, Principal, or Superintendent liable, and no administrative complaint filed under the ADA. The court also concluded that immunity under WIS. STAT. § 893.80 did not apply because § 118.31(3)(h) controlled.

DISCUSSION

¶9 The Loys contend on appeal that there are disputed issues of fact concerning whether the classroom was so out of control that Allison needed to use physical force to maintain control and whether the force Allison used was reasonable under the circumstances. Therefore, they assert, the court erred in concluding that, as a matter of law, Allison's conduct was permissible under WIS.

STAT. § 118.31(2)(h). The defendants respond that there are no material issues of fact and also that immunity is an alternative basis on which to affirm dismissal of the negligence claims. In reply, the Loys contend the circuit court correctly decided there is no immunity under WIS. STAT. § 893.80 if Allison's conduct is not permissible under § 118.31(2)(h) and, thus, the defendants are not entitled to summary judgment on the grounds of immunity.[5] We do not understand the Loys to be appealing the dismissal of the interference with contract claim or the ADA claim, but only the battery and negligence claims. Accordingly, the latter are the only claims we address.

¶10 Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We apply the same methodology as the trial court and review de novo the grant or denial of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). In evaluating the evidence, we consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute a genuine issue of material fact. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. ***Id.*** A factual issue is genuine if the evidence is such that reasonable jurors could return a verdict for the non-moving party. ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648

[5] Although the Loys address the issue of immunity in their reply brief, they also argue that the defendants may not raise this issue in their response because they did not file a cross-appeal. This is not correct. A respondent need not file a cross-appeal to argue an alternative ground for affirming the order or judgment appealed from, as long as the respondent is not seeking to modify the order or judgment. ***State v. Alles***, 106 Wis. 2d 368, 392-95, 316 N.W.2d 378 (1982).

(Ct. App. 1991). A material fact is one that is of consequence to the merits of the litigation. ***Interest of Michael R.B.***, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1992).

Battery Claim

¶11 Both the Loys and the defendants appear to agree that compliance with WIS. STAT. § 118.31 provides a complete defense to a claim of civil battery. However, we do not reach this issue because we begin with an analysis of the elements of the battery claim and conclude that, viewing the evidence in a manner most favorable to the Loys, no reasonable jury could find it establishes all the elements of the claim.

¶12 The pattern jury instruction for civil battery, WIS JI—CIVIL 2005, provides:

> Before you may find that (defendant) committed a battery, (plaintiff) must prove to a reasonable certainty by evidence that is clear, satisfactory, and convincing that (defendant) intentionally caused bodily harm to (plaintiff) and that (plaintiff) did not consent to the harm.
>
> The requirement that (defendant) caused bodily harm to (plaintiff) means that the defendant's act was a substantial factor in producing the bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.
>
> The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).
>
> You may determine intent directly or indirectly from all the facts in evidence. You may also consider any of the (defendant)'s statements or conduct which indicate state of mind.

The evidence on whether Allison caused bodily harm to Jeffrey is sparse. Jeffrey testified at his deposition that he did not have any bruises, cuts or scrapes as a result of hitting the heater and the opposite wall across from the door, but that "probably within a week or so" his back felt stiff. The entire testimony about his stiff back is as follows:[6]

> Q I'd like to talk to you now very briefly about any injuries you sustained in the incident. We talked earlier about your back right side coming in contact with the heater wall and then walking down to Mr. Carpenter's room. When did you first notice, if at all, that you were hurt because of what happened?
>
> A Probably within a week or so because my back felt really stiff.
>
> Q And so the first injury to your body that you noticed was a stiff back?
>
> A Yes.
>
> Q What did you do, if anything, in response to that injury that you were feeling?
>
> A Let's see, I tried to keep stretched out. I tried stretching and stuff.
>
> Q Did that work?
>
> A No.
>
> Q Did you seek any medical treatment because of your back?

[6] At the injunction hearing, when asked whether he was hurt by Allison grabbing him and pushing him out the door, Jeffrey answered, "[u]m, probably just a bruise or something, not really anything too serious." When asked "Nothing that you noticed?", he answered "no." For purposes of this decision we will accept Jeffrey's deposition testimony on his stiff back as more favorable to the battery claim than his testimony at the injunction hearing, without addressing the question of whether his later and apparently contradictory testimony is sufficient to create a genuine issue of fact. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102 (affidavit that directly contradicts witness's prior deposition testimony, without adequate explanation, is insufficient to create genuine issue of fact for trial).

A After a while I went to a chiropractor.

¶13 As already noted, the circuit court viewed it as "speculative" whether the stiff back was caused by Allison's conduct. We will assume for purposes of discussion that a reasonable jury could find from this testimony that Allison's conduct was a substantial factor in producing Jeffrey's stiff back and that the stiff back constituted "bodily harm." However, there must also be evidence or reasonable inferences from the evidence that Allison either had the mental purpose to cause bodily harm to Jeffrey or was aware that his conduct was practically certain to cause bodily harm. Viewing the evidence most favorably to the Loys, we conclude it does not show either.

¶14 Jeffrey gave the following account of Allison's conduct at his deposition. After he refused Allison's second or third instruction to leave, Allison moved the table that Jeffrey was leaning on to get around to him, causing Jeffrey's head to fall in his lap. Allison grabbed Jeffrey's shoulders and said "you're leaving." Jeffrey pulled away from Allison and went to a place near the door, where he squatted and then stood up. Allison came over to him and pushed him out the door, putting his hands on Jeffrey's left side, and maintaining constant contact with Jeffrey's body. Once in the hallway, Jeffrey said, "[they] hit the other side of the hallway. Mr. Allison said go to Mr. Carpenter's room." Jeffrey was "crying really bad now" and he went down the hall to Mr. Carpenter's room. By the time they reached the wall, Allison's "hands and his whole body was pushing against [Jeffrey]." When asked to describe the force that was used when he came into contact with the hallway, Jeffrey responded: "I just remember hitting the wall and the heater that was on the wall. It was pretty quick." At the injunction hearing, which occurred three months after the incident and nine

months before the deposition, Jeffrey provided the additional detail that, as Allison was pushing him out the door, he was trying to pull away from Allison.

¶15 It is reasonable to infer from this evidence that Allison intended to use his hands and body to remove Jeffrey from the room. However, there is nothing from Jeffrey's testimony that gives rise to a reasonable inference that Allison had the mental purpose to cause bodily harm to Jeffrey or was aware that his actions were practically certain to cause bodily harm. The description of "pushing" does not reasonably create such an inference, and there is no additional description suggesting a degree of force or a manner of pushing that might create such a reasonable inference.

¶16 The only account besides Jeffrey's about what occurred in the hallway is from Allison. Recognizing that if there is any conflict in the two accounts, we accept the one more favorable to Jeffrey's claim of battery, we analyze Allison's testimony to determine whether it adds any evidence favorable to Jeffrey. Allison agrees with Jeffrey that he used his hands and body to push Jeffrey out the door and across the hallway to the opposite wall. Allison adds that he "pressed [Jeffrey's] body against the wall … so my right side is on his left side. His right side is against the wall." When asked when he released Jeffrey, Allison answered: "When I felt that he was no longer struggling, and I said 'Just go to Mr. Carpenter's.'" ***Id.*** at 56. There is nothing from this testimony that creates a reasonable inference that Allison had the mental purpose to cause bodily harm to Jeffrey or was aware that his conduct was practically certain to cause bodily harm. That is, there is nothing to suggest that he held or pushed or pressed against Jeffrey in such a way that might reasonably give rise to either of those inferences. The only reasonable inference is that Allison's purpose in pressing Jeffrey's body against the wall was to get him to stop struggling. It may be debatable whether it

was reasonable for Allison to press his body against Jeffrey's for that purpose, but, even if it were unreasonable to do so, there is nonetheless no reasonable inference that Allison intended to cause Jeffrey bodily harm in doing so.

¶17 We have also examined the evidence of what occurred in the classroom—the testimony of both Jeffrey and Allison from their depositions and the injunction hearing, as well as the testimony of the classmate who testified at the injunction hearing—and we are satisfied that none of this evidence adds anything favorable to Jeffrey on the issue of Allison's intent to cause him bodily harm. There are factual disputes over the degree of disruption that Jeffrey's conduct caused, but they are not material to the battery claim. Whether or not it was reasonable for Allison to remove Jeffrey from the room because of his conduct, there is no dispute that Allison's purpose was to remove Jeffrey from the room.

¶18 Finally, the evidence of the bodily harm does not create an inference that Allison intended to harm Jeffrey. The bodily harm described is minimal and the description so general that it is not reasonable to infer from Jeffrey's stiff back, which he noticed "probably within a week or so," that Allison had the mental purpose to cause bodily harm to Jeffrey or was aware that his conduct was practically certain to cause bodily harm.

¶19 We conclude that the evidence, viewed most favorably to the Loys, does not provide a basis from which a reasonable jury could decide that Allison intended to cause Jeffrey bodily harm. Allison is therefore entitled to summary judgment on the battery claim.

Negligence Claims

¶20 The negligence claims in the complaint consist of a negligence claim against Allison and three separately pleaded negligence claims against each of the other three defendants: for negligently supervising Allison, for failing to protect Jeffrey from Allison's conduct, and for condoning Allison's conduct. The dispositive issue is whether immunity under WIS. STAT. § 893.80(4) applies to these four claims. We conclude it does.

¶21 The governmental immunity statute, WIS. STAT. § 893.80(4), confers broad immunity from suit on municipalities and their officers and employees:

> **(4)** No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

"The statute immunizes against liability for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been collectively interpreted to include any act that involves the exercise of discretion and judgment." ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶¶20-21, 253 Wis. 2d 323, 646 N.W.2d 314 (citations omitted).

¶22 There are several exceptions to this immunity, one being for ministerial duties imposed by law. ***Id.***, ¶24.

> [Actually this] is not so much an exception as a recognition that immunity law distinguishes between discretionary and ministerial [duties], immunizing the

> performance of the former but not the latter. A ministerial duty is one that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion."
>
> Put another way, a duty is regarded as ministerial when it has been "'positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.'"

Id., ¶¶25-26 (citations omitted).

¶23 The Loys argue that WIS. STAT. § 118.31 imposes a ministerial duty to refrain from using corporal punishment with certain exceptions, and, therefore, if Allison violated the statute, he is not entitled to immunity on the negligence claims. In the Loys' view, there are disputed issues of material fact on whether Allison violated § 118.31, and, therefore, summary judgment on the grounds of immunity is improper.

¶24 WISCONSIN STAT. § 118.31 provides in relevant part:

> **Corporal punishment. (1)** In this section, "corporal punishment" means the intentional infliction of physical pain which is used as a means of discipline. "Corporal punishment" includes, but is not limited to, paddling, slapping or prolonged maintenance of physically painful positions, when used as a means of discipline. "Corporal punishment" does not include actions consistent with an individualized education program developed under s. 115.787 or reasonable physical activities associated with athletic training.
>
> **(2)** Except as provided in sub. (3), no official, employee or agent of a school board may subject a pupil enrolled in the school district to corporal punishment.
>
> **(3)** Subsection (2) does not prohibit an official, employee or agent of a school board from:

> ….
>
> (h) Using incidental, minor or reasonable physical contact designed to maintain order and control.
>
> **(4)** Each school board shall adopt a policy that allows any official, employee or agent of the school board to use reasonable and necessary force for the purposes of sub. (3)(a) to (h). In determining whether or not a person was acting within the exceptions in sub. (3), deference shall be given to reasonable, good faith judgments made by an official, employee or agent of a school board.

¶25 We do not agree with the Loys that WIS. STAT. § 118.31 imposes a ministerial duty that defeats immunity on the negligence claims. First, corporal punishment is defined as "the *intentional* infliction of physical pain." Section 118.31(1). A violation of the statute, therefore, means that the violator has not been negligent, but has committed an intentional tort, such as battery. The statute simply does not address negligent infliction of physical pain.

¶26 Second, the plain language of the statute contemplates that school board employees will exercise their discretion in deciding when corporal punishment is permitted under the statute. The permitted conduct under WIS. STAT. § 118.31(3)[7] is described in terms of what is "reasonable" in the particular

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[7] WISCONSIN STAT. § 118.31(3) provides in full:

> **(3)** Subsection (2) does not prohibit an official, employee or agent of a school board from:
>
> (a) Using reasonable and necessary force to quell a disturbance or prevent an act that threatens physical injury to any person.
>
> (b) Using reasonable and necessary force to obtain possession of a weapon or other dangerous object within a pupil's control.
>
> (c) Using reasonable and necessary force for the purpose of self-defense or the defense of others under s. 939.48.

(continued)

circumstances; and the school boards, in determining whether an employee has acted within these exceptions is give to "deference" to "reasonable, good faith judgments made by [the] … employee.…" Section 118.31(4). The use of these terms are plainly antithetical to the imposition of a duty that is absolute, certain and imperative. Indeed, the statute does not even impose a duty to act, let alone a duty to act in a particular way "as to time, mode, and occasion for performance … [without] admit[ting] of any discretion." ***Lodl***, ¶44.

¶27 The case on which the Loys rely does not support their position. In ***Rolland v. County of Milwaukee***, 2001 WI App 53, 241 Wis. 2d 215, 625 N.W.2d 590, the guidelines for the city bus drivers provided that "[t]he use of restraining straps is mandatory for all wheelchairs on [the] buses" and also contained directions on how to attach the straps. ***Id.***, ¶3. We concluded that how a driver secured a passenger was a discretionary, not a ministerial task, because it required the exercise of judgment, but that there was a factual dispute whether the bus driver ignored his mandatory, ministerial duty not to drive the bus with a wheelchair unless the passenger was secured. ***Id.***, ¶12.

> (d) Using reasonable and necessary force for the protection of property under s. 939.49.
>
> (e) Using reasonable and necessary force to remove a disruptive pupil from a school premises or motor vehicle, as defined in s. 125.09 (2)(a) 1. and 4., or from school-sponsored activities.
>
> (f) Using reasonable and necessary force to prevent a pupil from inflicting harm on himself or herself.
>
> (g) Using reasonable and necessary force to protect the safety of others.
>
> (h) Using incidental, minor or reasonable physical contact designed to maintain order and control.

¶28 The Loys argue that WIS. STAT. § 118.31 presents an analogous situation: the duty to refrain from corporal punishment is ministerial and mandatory, they assert, but "how Allison applied that duty is discretionary." We disagree. The duty to refrain from intentionally inflicting physical pain as a means of discipline—if indeed the prohibition against intentional conduct is properly described as a "duty"—has certain exceptions that are defined in terms of reasonableness in the particular circumstances. Thus, the question whether a school board employee has acted in accordance with this "duty" can only be answered by examining the reasonableness of the employee's conduct in the particular circumstances. This is not analogous to a duty to secure passengers with a strap.

CONCLUSION

¶29 We conclude there are no genuine issues of material fact on the battery claim and that Allison is entitled to judgment as a matter of law dismissing this claim. We also conclude that all defendants are entitled to immunity under WIS. STAT. § 893.80(4) on the negligence claims. Accordingly, while employing a different analysis than that used by the trial court, we nonetheless affirm the summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.